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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA**

11 **In re**) **Case No. 09-12738-A11**
12 **PACERS, INC.,**)
13 **Debtors.**) **FINDINGS OF FACT AND**
14) **CONCLUSIONS OF LAW**
15) **Re: Appointment of Chapter 11**
16) **Trustee**

16 The matter came on for hearing on March 18, 2010, at 10:00 a.m. in
17 Department Two of the above-entitled Court, the Honorable Louise DeCarl Adler,
18 presiding, in two related contested matters: 1) the Debtor-in-Possession's Motion
19 to Assume Certain Unexpired Leases; and 2) the Debtor-in-Possession's Motion to
20 Approve Bid Procedures. Appearances were made by Michael D. Breslauer, Esq.,
21 counsel for Pacers, Inc. ("Debtor" or "Pacers"); Jason Mohny ("Mohny"),
22 president and principal of Debtor-in-Possession was also present; William F.
23 Fennell, Esq., counsel for the Official Unsecured Creditors Committee (the
24 "OCC"); Christopher V. Hawkins, Esq., counsel for court-appointed Examiner;
25 Thomas C. Hebrank, the court-appointed Examiner ("Examiner"); Robert Barnes,
26 Esq., counsel for Tollis, Inc. ("Tollis"); David Ortiz, Esq., counsel for the United
27 States Trustee ("UST"); Michael St. James, Esq., counsel for Deja Vu Consulting,
28 by telephone; Robert Biederman, Esq. ("Biederman"), counsel for San Diego

1 Fantasy, LLC (“SDF”), by telephone; also present in the courtroom were Keith
2 Campbell, broker; and Chairperson of the OCC, Lisa Breedlove. There were no
3 other appearances.

4 **FINDINGS OF FACT**

5 Based on the testimonial and documentary evidence in the record in the
6 Debtor’s case, as well as argument of counsel at the above hearing, this Court
7 makes the following findings of fact:

8 ***Prepetition Events***

9 1. Debtor owns and operates the Pacers bar and strip club located on
10 Midway Drive in San Diego, California. Debtor has operated at that location for
11 over 20 years. In April 2006, Debtor began to use Hustler trademarks and the
12 “Larry Flynt’s Hustler Club” name.

13 2. David Ford was the previous owner and president of both Debtor and
14 Diamond D Equities, Inc. (“Diamond D”), the entity that owned the parking lot
15 adjacent to the Pacers club.

16 3. In 1999, Mohney purchased 100% of the stock in Debtor from David
17 Ford, and Tollis purchased the adjacent parking lot from Diamond D.

18 4. Mohney was, and currently is, the Debtor’s president and sole
19 shareholder.

20 5. Harry Mohney is Mohney’s father.

21 6. Harry Mohney is the indirect owner of 100% of the stock in Tollis.
22 Specifically, the stock in Tollis is owned by Imagination, Inc. (“Imagination”),
23 which is owned by Harry Mohney through a revocable family trust. Harry
24 Mohney is the trustee of the trust. Mohney and his siblings, and their children, are
25 the contingent beneficiaries of the trust. Mohney acknowledged his indirect,
26 contingent interest in Tollis *after* it was revealed to the Court in March 2010.

27 7. Debtor’s customers use the adjacent parking lot, which the Debtor
28 leases from Tollis pursuant to a written lease dated September 1, 1999, as

1 amended (the "Tollis lease"). Debtor currently pays monthly rent of \$50,000
2 (\$600,000 annually), to Tollis to use this parking lot.

3 8. In 2008, Lisa Breedlove ("Ms. Breedlove") filed a suit against the
4 Debtor for sexual harassment and retaliatory termination of her employment. The
5 action was filed in the San Diego Superior Court, but was subject to mandatory
6 arbitration. At least three additional actions have been filed against the Debtor
7 asserting comparable instances of sexual harassment and retaliatory termination
8 (collectively "Tort Claims").

9 9. On May 12, 2009, Ms. Breedlove received an interim arbitration
10 award against the Debtor. On July 20, 2009, a final arbitration award was entered
11 in favor of Ms. Breedlove, and against the Debtor, in the sum of \$940,000
12 ("Arbitration Award").

13 10. In July 2009, Mohny formed SDF. Mohny is the sole owner and
14 managing member of SDF. SDF was formed for the purpose of bidding Debtor's
15 assets out of bankruptcy.

16 11. SDF's attorney and "authorized representative" is Robert Biederman,
17 Esq. Mr. Biederman also represented both Debtor and Tollis in negotiating the
18 Tollis parking lot lease. Mr. Biederman personally represents Mohny, Harry
19 Mohny and many of the Mohny-related entities in other matters.

20 12. On August 25, 2009, SDF made a written offer ("August Purchase
21 Offer") to purchase substantially all of the Debtor's assets. The August Purchase
22 Offer was made at Mohny's direction, and Mr. Biederman signed the offer for
23 SDF instead of Mohny.

24 13. The August Purchase Offer contemplates the Debtor would file a
25 chapter 11 petition with the intention of seeking an order approving the sale to
26 SDF pursuant to § 363 free and clear of all liens and other interests to be entered
27 on or before November 1, 2009. Additionally, it required Debtor to assume and
28 assign the Tollis parking lot lease to SDF pursuant to § 365 as a condition to the

1 purchase transaction. The August Purchase Offer was for \$300,000 payable to
2 Debtor for its assets, plus SDF's agreement to pay \$225,000 to Tollis to cure
3 prepetition defaults owed under the Tollis lease.

4 *Postpetition Events*

5 14. On August 27, 2009 (the "Petition Date"), Debtor filed a voluntary
6 chapter 11 proceeding in the U.S. Bankruptcy Court, Southern District of
7 California, San Diego.

8 15. Debtor made a First Day Motion to Pay Wages and Salaries ("First
9 Day Motion"). In support of the First Day Motion, Mohney filed a Declaration
10 explaining the Debtor's case was filed after its efforts to settle the Arbitration
11 Award and the Tort Claims were unsuccessful. Mohney described the Debtor's
12 operations as profitable with gross annual income of approximately \$3,000,000,
13 and in excess of \$200,000 in surplus cash. Further, he indicated the Debtor had
14 less than \$10,000 in secured debt; no overdue trade debts; and had historically
15 paid its debts as they came due. He explained: "The primary objective for the
16 Chapter 11 filing [is] to preserve the going concern value and ongoing operation
17 of Pacers' business. Reorganization under that model will maximize the funds
18 available for payment of creditors." [D.E. # 11 at ¶ 6]

19 16. The First Day Motion did not disclose Mohney's recent formation of
20 SDF, or that SDF had made a prepetition purchase offer. It did not disclose the
21 Debtor intended to seek a quick sale of its assets. Debtor's failure to disclose this
22 material information at the outset of its case was dishonest.

23 17. The OCC was appointed on October 6, 2009.

24 18. On October 30, 2009, SDF renewed its offer ("October Purchase
25 Offer) to purchase the Debtor's assets. The October Purchase Offer was identical
26 to the August Purchase Offer except it set a new deadline of January 15, 2010 to
27 obtain an order approving the sale to SDF, and assumption/assignment of the
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1 Tollis lease. Once again, Mr. Biederman signed the purchase offer for SDF
2 instead of Mohney.

3 19. On November 5, 2009, Debtor filed on regular notice Motions to
4 (1) Pay Related Entities; (2) Extend Time to Assume or Reject Nonresidential Real
5 Property Leases; and (3) Appoint an Examiner with Limited Authority (the
6 “Examiner Motion”). These motions were scheduled for December 3, 2009.

7 20. The Examiner Motion for the first time disclosed the Debtor’s
8 intention to sell its assets to SDF. In the Examiner Motion, Debtor acknowledged
9 the sale to SDF was not arms’ length and would be subject to stricter scrutiny
10 because “SDF is an entity which is related to or an affiliate of the Debtor.” [D.E.
11 # 48 at 5:9]¹ Debtor indicated it was requesting appointment of an Examiner for
12 the limited purpose of suggesting appropriate bidding procedures to ensure the
13 sale to SDF has a fair and reasonable chance of generating the highest possible
14 price for the Debtor’s assets.

15 21. In the Examiner Motion, Debtor represented the SDF offer (\$300,000
16 payable to Debtor) was made in good faith and likely the “highest and best value
17 reasonably obtainable for the Debtor’s assets.” [*Id.* at 3:5-6] Debtor indicated it
18 was unlikely to receive a higher offer because “a substantial portion of the value of
19 its Club is associated with the Hustler License and the Deja Vu License,” which
20 the Debtor could not continue to use in this bankruptcy case; nor could the Debtor
21 assume and assign these license rights, over the objection of the licensors, Deja Vu
22 (another Mohney-related entity) or LFP Publishing Group (“LFP Publishing”), the
23 holder of the Hustler license. [*Id.* at 3-4] Because of the license issues, Debtor
24 claimed its chapter 11 case could not be reorganized and had to be of “short
25 duration.” Debtor represented it was “guardedly optimistic” that it could persuade

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27 ¹ See also Examiner Motion at 3:2-4: “SDF is an entity which is related to the Debtor.
28 Specifically, the *owners* of SDF are *related to the owner* of the equity interests of Debtor.”
(Emphasis added.)

1 the licensors to refrain from taking adverse action through February 2010, giving
2 Debtor time to complete the sale of its assets. [*Id.*]

3 22. Mohney filed a Consolidated Declaration in support of the Examiner
4 Motion and the other related motions. [D.E. #51] Mohney's Consolidated
5 Declaration disclosed: "SDF is an entity whose owners are related to me." [*Id.* at
6 6:18-19] Similar to the Examiner Motion, Mohney's phrasing gives the false
7 impression that SDF is owned by third persons and/or entities related to him, but
8 not by Mohney himself. Mohney made no further disclosure about SDF, or the
9 purchase offer. This purchase offer, attached as Exhibit "E" to the motion, was the
10 October Purchase Offer, giving the misleading impression it had just surfaced.
11 Since, Mr. Biederman also signed the October Purchase Offer on behalf of SDF,
12 Mohney's direct interest in SDF was concealed.

13 23. With respect to the license agreements, Mohney's Consolidated
14 Declaration disclosed: The Deja Vu licensing agreement is the "vehicle through
15 which the Debtor acquires 'Hustler' themed and trademarked items for sale within
16 the club." [*Id.* at 3:22-26] His phrasing gave the misleading impression that Deja
17 Vu owned the Hustler trademarks, not Debtor.

18 24. With respect to the Tollis lease, Mohney's Consolidated Declaration
19 disclosed that Tollis was an entity owned by his father, Harry Mohney. His
20 phrasing is misleading since he was aware that the chain of ownership was
21 through a revocable family trust in which Mohney held a contingent beneficial
22 interest.

23 25. On November 10, 2009, Mohney testified as the Debtor's responsible
24 officer at the continued § 341(a) meeting of creditors. At that hearing, Mohney
25 was unable to answer any questions about his ownership in SDF; if he was the
26 manager of SDF; or when SDF was created. Given that the Court now knows

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1 Mohney formed SDF in July 2009 in contemplation of Debtor's bankruptcy, the
2 Court finds his testimony dishonest.

3 26. On November 23, 2009, the OCC filed opposition to the Examiner
4 Motion, and on November 24, 2009, it filed a Motion to Appoint a Chapter 11
5 Trustee ("Trustee Motion") on the ground, among others, that there was a lack of
6 disclosure by Mohney, including his failure to disclose he was sole owner and
7 managing member of SDF. Additionally, the OCC requested and obtained from
8 this Court an order rescheduling the Examiner Motion and the Trustee Motion so
9 they could be heard concurrently.

10 27. On November 25, 2009, Mohney filed a Declaration responding to
11 the OCC's claim that he had failed to disclose his interest in SDF. In this
12 Declaration, Mohney claimed he owned so many different entities he did not know
13 whether he was the sole direct owner and manager of SDF, or merely held an
14 indirect interest in an entity that held an interest in SDF. Mohney's explanation
15 appeared plausible based upon the facts at that time. Based upon the facts that
16 have now surfaced, the Court finds his explanation dishonest.

17 28. The Trustee Motion and the Examiner Motion were heard together on
18 December 17, 2009, at which time the Court denied the Trustee Motion without
19 prejudice, but ordered the appointment of an Examiner with expanded powers. In
20 addition to the duties specified in the Examiner Motion (to set bid procedures for
21 the possible sale to SDF), the Court directed the Examiner to review the SDF
22 purchase offer; to investigate whether the Debtor's contracts with its related
23 entities were reasonable and necessary; and to opine on whether the proposed sale
24 to SDF, rather than reorganization, was in the best interests of creditors.

25 29. The Examiner was appointed by order entered December 27, 2009.

26 30. On February 5, 2010, the Examiner filed his Initial Report. [D.E.
27 # 131] The Examiner found that many of the Debtor's contracts with related
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1 entities were reasonable and beneficial to the Debtor.² However, the Examiner
2 found the Debtor had mis-characterized its contract with Deja Vu as a single
3 contract. He found the Debtor had two contracts with Deja Vu: A consulting
4 agreement with Deja Vu to provide general management services and a licensing
5 agreement to use Deja Vu trademarks. The Examiner found the Debtor was using
6 Deja Vu's management services, but the Debtor did not use any of the Deja Vu
7 trademarks in its business, and payment of the \$1,250 monthly Deja Vu licensing
8 fee was not a necessary or beneficial expense. Further, the Examiner found the
9 Debtor had a separate licensing agreement with LFP Publishing to use the Hustler
10 trademarks, which agreement was not tied to the Deja Vu licensing agreement. He
11 found that although the Debtor used the Hustler trademarks in its operations, like
12 the Deja Vu trademarks, the Hustler trademarks were not necessary or essential to
13 the Debtor's business value. Given the Examiner's findings, the Court finds that
14 many of the representations made in the Debtor's Examiner Motion (*e.g.*, Debtor's
15 major components of value; Debtor's inability to reorganize its successful business
16 due to the licenses; and Debtor's need for a prompt sale), were misleading and
17 dishonest.

18 31. Additionally, the Examiner found the Tollis lease to be of material
19 value, and an essential asset to third party purchasers, due to lack of on-street
20 parking or other parking options in the area. The Examiner acknowledged that the
21 OCC contended that the Tollis lease was substantially over-market and not a true
22 lease. He did not express his own opinion except to observe the amount of the
23 monthly lease payment would be material to potential buyers, and a reduction of
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26 ² The OCC contends that, based upon the facts that have surfaced, the Court should revisit
27 this finding. It contends these related entity contracts are a mechanism to siphon money to the
28 Mohny family. The Court makes no findings on this issue, except to observe that a Chapter 11
trustee will be in the best position to assess the actual benefit of these related entity contracts to
Debtor's business operations.

1 the lease payments would have a significant effect on the Debtor's reorganization
2 options.

3 32. Debtor did not contest the Examiner's findings that it does not use the
4 Deja Vu trademarks in its business, and they are not a material component of its
5 value. Debtor promptly rejected the Deja Vu licensing agreement. Debtor has not
6 yet rejected the Hustler licensing agreement. As far as this Court is aware, the
7 Debtor continues to operate under the Hustler name and it continues to sell Hustler
8 products in its business without objection by LFP Publishing.

9 33. Debtor reserved a hearing date of March 18, 2010 for the Court to
10 approve its proposed sale and assumption and assignment of certain executory
11 contracts and leases to SDF. Debtor argued that the sale of its assets had to be
12 completed and an order entered before March 25, 2010 because, pursuant to § 365
13 as amended by BAPCPA, March 25, 2010 was the last date the Court could enter
14 an order assuming the Tollis lease, or the Tollis lease would be deemed rejected by
15 operation of law. Debtor represented that Tollis/Harry Mohny would not agree to
16 extend this final deadline to assume their lease.

17 34. On February 18, 2010 and on February 23, 2010, the Court held
18 hearings to consider the Examiner's Initial Report and to approve the Debtor's
19 bidding procedures for its March 18, 2010 sale hearing. At these hearings, the OCC
20 objected to the Debtor's March 18, 2010, sale date on the grounds that: (1) Debtor
21 had not yet marketed its assets to third parties so a sale was premature; and (2) the
22 SDF offer was too low in relation to the value of the Debtor's assets to approve as a
23 good faith "stalking horse" bid. The OCC's objection was supported by the
24 Examiner who agreed the Debtor had not yet conducted any serious marketing of
25 its assets to third parties.

26 35. At the February 23, 2010 hearing, the Court found the Debtor's
27 marketing to be inadequate. Accordingly, it directed the Debtor to file an
28 application to employ a business broker to market its assets to third parties, and

1 continued the sale hearing to April 22, 2010. Since Debtor insisted the Court had
2 to enter an order assuming the Tollis lease before March 25, 2010 to preserve this
3 vital asset, and all parties at that time agreed the Tollis lease was a vital asset, the
4 Court agreed to use the March 18, 2010 hearing to consider Debtor's motion to
5 assume the Tollis lease and to the approve bidding procedures for the recalendared
6 April 22, 2010 sale date.

7 *Events Triggering Appointment of a Chapter 11 Trustee*

8 36. On February 25, 2010, Debtor filed its motion to assume the Tollis
9 lease and, on March 8, 2010, Debtor filed its motion to approve the bidding
10 procedures and designate SDF as the "stalking horse" bid.

11 37. On March 8, 2010, Debtor filed its application to employ Keith
12 Campbell of Exodus Business Solutions as Debtor's Agent/Broker to market the
13 sale of its assets to third parties, which the Court approved.

14 38. On March 10, 2010, Mohney appeared for a deposition scheduled by
15 the OCC. At this deposition, Mohney still could not recall when SDF was formed.
16 Given the facts that have surfaced, the Court finds his testimony dishonest.

17 39. On March 10, 2010, Tollis/Harry Mohney filed a response to the
18 Debtor's lease assumption motion confirming that March 25, 2010 was a final
19 deadline. [D.E. #168] At footnote 1 of this response, for the first time it was
20 disclosed that Harry Mohney indirectly owned the stock of Tollis through a
21 revocable trust, and Mohney was a contingent beneficiary of this trust.

22 40. On March 11, 2010, the OCC filed opposition to the bidding
23 procedures motion and, on March 12, 2010, it filed opposition to the lease
24 assumption motion (collectively "Opposition"). The Opposition brought to light
25 many of the dishonest statements of Debtor/Mohney. Particularly, the Court for the
26 first time learned:

- 27 ● Mohney formed SDF in July 2009 in response to the Arbitration Award to
28 purchase Debtor's assets out of this bankruptcy case; SDF made the August

1 Purchase Offer, which was not disclosed, signed by Mr. Biederman just two
2 days before the petition date;

- 3 ● Mr. Biederman represents the Debtor, Mohney, Harry Mohney and their
4 many related entities;
- 5 ● Mr. Biederman represented both Tollis and the Debtor in negotiating the
6 Tollis lease and there were no negotiations by Debtor to establish reasonable
7 rental rates; and
- 8 ● Debtor had not obtained a valuation of its assets to establish the
9 reasonableness of SDF's October Purchase Offer to pay \$300,000 for
10 Debtor's assets.

11 41. On March 12, 2010, the Examiner filed a Supplemental Report
12 reversing his initial position that the Tollis parking lot lease was material to the
13 Debtor's business. [D.E. # 175] The Examiner explained his initial conclusion
14 had been based upon his belief that the Debtor had no other parking alternatives.
15 However, he had recently become aware of a smaller, unpaved lot located within
16 600 feet of the Debtor's business when he saw a "for lease" sign posted on the
17 fence. Given that the monthly rent for this alternate lot was only \$3,800 compared
18 to the \$50,000 monthly rent under the Tollis lease, he felt the disadvantages of the
19 smaller lot were offset by the substantial monthly rental savings. Further, the
20 Examiner explained why he found no support for the Debtor's argument that the
21 alternate lot could not provide the requisite number of parking spaces due to
22 set-back requirements. He also indicated that Mr. Campbell (Debtor's newly hired
23 business broker) had contacted the broker for the alternate lot to confirm its
24 availability for long term lease, and had requested that the listing broker hold off
25 on accepting another offer for a few days to give the Debtor an opportunity to make
26 an offer.

27 42. On March 16, 2010, both the Debtor and Tollis/Harry Mohney filed
28 replies to the OCC's opposition and to the Examiner's Supplemental Report. [D.E.

1 ##179 and 180] Tollis/Harry Mohney asked the Court to disregard the alternate lot
2 because it could not be available to provide parking on March 25, 2010. They
3 argued the only “certainty” was that the Tollis lease must be assumed and an order
4 entered before March 25, 2010, otherwise the business would have to “shut down”
5 since Debtor would not have a parking lot. According to Tollis/Harry Mohney,
6 without lease assumption by March 25, 2010, the Debtor would be selling a
7 “shuttered” business which would chill bidding and the purchase price.

8 43. The Debtor’s reply admitted Mohney was aware he had an indirect,
9 contingent trust interest in Tollis. Additionally, it admitted Debtor had been aware
10 of the alternate parking lot for “quite some time.” [D.E. # 179 (Mohney Declaration
11 filed March 16, 2010 at ¶ 6)] Debtor claims it had explored leasing this alternate
12 lot as additional parking for Pacers, but determined it would not be feasible.

13 44. Additionally, on March 17, 2010, Debtor filed a supplemental
14 declaration stating the broker for the alternate lot had indicated his client would
15 likely not be interested in accepting a one-month cash payment to keep the lease
16 available through the April 22, 2010 sale hearing; his client would not be interested
17 in entering into long term lease; and, as of March 16, 2010, the alternate lot was no
18 longer available because the owner had accepted an offer for a nine month lease,
19 with a four-year option. [D.E. #182]

20 45. The Court makes no findings concerning the feasibility of using the
21 alternate lot as a parking lot for the Debtor’s business; or the reason the lot became
22 unavailable. The Court merely observes that the Debtor had received different
23 information than the Examiner had received a few days earlier. Further, the Court
24 finds the Debtor was dishonest in failing to disclose this alternate lot. Given the
25 material importance of parking to Debtor’s business, Debtor should have disclosed
26 all possible parking options even if Debtor deemed them unfeasible.

27 46. At the March 18, 2010 hearing, the Examiner reported that
28 Mr. Campbell had received a third party offer for \$800,000 *without the Tollis*

1 *parking lot lease*.³ Further, he announced that Mr. Campbell anticipated the receipt
2 of other offers shortly, but these anticipated buyers had *no interest in the Tollis*
3 *parking lot lease* either. Based upon these newly discovered facts, and because the
4 Examiner now agreed that the Tollis lease was substantially over-market, the
5 Examiner stated on the record his recommendation to reject the Tollis lease.

6 47. At the March 18, 2010 hearing, the OCC made an oral motion that the
7 Court appoint a chapter 11 trustee in Debtor's case based upon the facts that had
8 surfaced since the Court had first considered the OCC's Trustee Motion. The
9 OCC's oral motion was supported by the UST and the Examiner, and opposed by
10 the Debtor and Tollis/Harry Mohney.

11 48. After hearing the arguments in support and against the various
12 motions, the Court announced it was denying the Debtor's motion to assume the
13 Tollis lease for lack of sound business judgment; it was granting the OCC's oral
14 motion to immediately appoint a chapter 11 trustee; and it would be referring the
15 Debtor's case to the United States Attorney to investigate possible Title 18
16 violations.

17 49. All Findings of Fact that are Conclusions of Law shall be deemed to
18 be Conclusions of Law.

19 CONCLUSIONS OF LAW

20 This Court concludes the following as a matter of law:

21 50. The Court has the authority pursuant to 11 U.S.C. § 105 and § 1104 to
22 grant an oral motion to appoint a chapter 11 trustee upon "reasonable" notice and
23 an opportunity for hearing to the debtor. *See In re Bibo, Inc.* 76 F.3d 256 (9th Cir.
24 1996) (holding a judge's statement at a hearing that she was considering appointing
25 a trustee constituted reasonable notice and an opportunity for hearing where the
26 debtor had the opportunity to argue and present competing evidence concerning the
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28 ³ Mr. Campbell was present in the Court.

1 allegations that were the basis for the appointment).

2 51. Reasonable notice has been afforded to the Debtor because it has been
3 aware of the OCC's position that a chapter 11 trustee should be appointed since the
4 OCC filed its motion to appoint a trustee on November 24, 2009. That motion was
5 denied without prejudice, and an Examiner with expanded powers appointed.
6 Since then, the Examiner's Initial Report and Supplemental Report have been filed
7 bringing to light many new facts, and Debtor has had the opportunity to present
8 competing evidence. Further, the OCC has discovered other facts, some of which
9 Debtor now admits.

10 52. Cause exists to appoint a chapter 11 trustee due to the Debtor's lack of
11 candor and its repeated dishonesty concerning material facts in this case. 11 U.S.C.
12 § 1104(a)(1). Additionally, cause exists because the Court has no confidence in
13 Mohny's veracity or his ability to carry out the Debtor's duties in a manner
14 consistent with the best interests of the creditors of this estate. 11 U.S.C.
15 §§ 1104(a)(1)(2). Finally, although the Court does not find any evidence of
16 postpetition mismanagement of Debtor's business to date, "cause" exists to appoint
17 a chapter 11 trustee immediately without a further hearing because the Court has no
18 confidence the Debtor will make a good faith attempt to keep its business open and
19 operating now that the Court has ordered the Tollis lease rejected. *Id.* It is in the
20 best interests of the creditors of this estate that independent management continue
21 business operations until the Debtor can be sold or otherwise reorganized.

22 53. All Conclusions of Law that are Findings of Fact shall be deemed to
23 be Findings of Fact.

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26 Dated: 4 May 2010



LOUISE DE CARL ADLER, Judge

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